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—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1906.

CHAPMAN & DEWEY LAND COMPANY,
Plaintiff in Error,
vs.
CHARLES H. BIGELOW, N. P. BIGELOW, L. T. WALKER AND F. H. HARTSHORN,
Defendants in Error.

No. 262.

In Error to the Supreme Court of the State of Arkansas.

Reply Brief for Plaintiff in Error.

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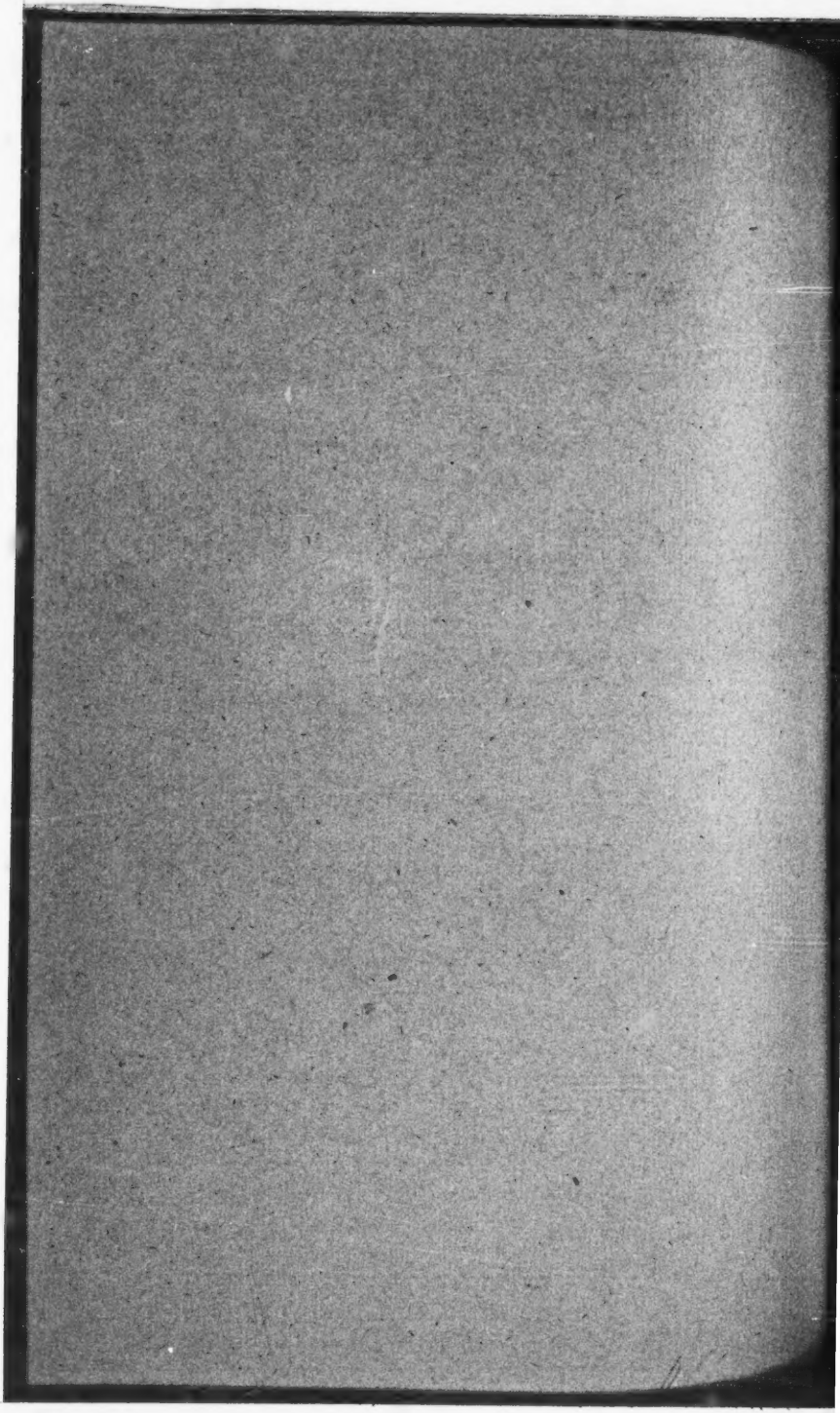

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REPLY BRIEF FOR PLAINTIFF IN ERROR.

I.

The plaintiff in error, as the record fully shows, owns all of the surveyed land in both Township 12, Range 6, and Township 12, Range 7, bordering on the *locus in quo,* and east of the St. Francis river The surveyed land of the plaintiff in error adjoining the *locus in quo* on the east is in Township 12, Range 7. But for some reason, (presumably an inadvertence,) the ownership of this surveyed land by the plaintiff in error, on the east consisting of sections 6, 7, 18, 19 and 30 in Township 12, Range 7, and of its surveyed sections 35 and 36 on the southeast in Township 12, Range 6, does not appear marked on the plat of James Anthony,

which will be found on page 138 of the transcript and a copy of which will be found in the front part of the former brief of plaintiff in error.

The omission of the defendants in error to mention Township 12, Range 7, is especially significant when they are pressing their contentions to the ownership of the land in question upon their theory that the United States patents conveyed the whole townships to the State of Arkansas. Their reticence about said Township 12, Range 7, in this connection, one is forced to conclude arises from the fact that the external meander line on the west of this township leaves a large tract of land without the limits thereof, and excluded therefrom by their own contention that this meander line is a boundary line.

II.

Federal qestions cannot be eliminated.

The defendants in error in their first brief attempt to eliminate the Federal question from this case by departing from the real questions on which the case was tried and decided in the State courts. The Record shows what these questions were, and it is not now within the power of the defendants in error to escape from them by seeking to give the case a new aspect in this court.

For the purpose of sustaining their claims in the State courts, the defendants in error denied that any riparian rights ever accrued to plaintiff in error by virtue of its ownership of the surveyed lands abutting on the body of water shown on the plats of the surveys. Their contention in the State courts was that the region in question was not, at the time of the surveys, a body of water at all, but "a body of lands." (Transcript p. 77). Their answer to the complaint was a studied at-

tempt to show that this case belonged in the same class with *Horne* v. *Smith* and that therefore the rule of *Hardin* v. *Jordan* was inapplicable and the evidence offered by defendants in error and admitted over the objection of the plaintiff in error, was all for the purpose of sustaining the allegations so contained in their answer. The official field notes and plats of survey, selections by the state, approvals and patents by the United States, and findings of the Secretary of the Interior were all duly urged by plaintiff in error as opposed to the allegations contained in the answer of the defendants in error and as conclusive against the evidence offered by them; which evidence so offered by the defendants in error, was duly objected to by the plaintiff in error. The Federal questions thus clearly presented were decided by the State courts adversely to the plaintiff in error. All of which appears in the record.

In their first brief, defendants in error now treat the case as though they too were claiming title through the state under the rule of *Hardin* v. *Jordan* precisely as the plaintiff in error is claiming it, which, of course, necessarily concedes the riparian character of the lands. See pages 1 to 4 of the first brief of defendants in error. They say:

"Under the rule laid down in *Hardin* v. *Jordan* the title to the land under water in these townships passed incidentally, upon the issuance of these patents to the State of Arkansas."

"Both parties to this litigation claim under the State of Arkansas,—the patentee—and it follows that the existence of a Federal question is impossible." Page 2 of first brief of defendants in error. This is clearly an attempt to have it appear that both parties are claiming under the State of Arkansas the same riparian title derived by the state from the United States, a proposition now advanced for the first time by the defendants

in error and wholly incorrect in law and fact as clearly shown by the record.

Thus it appears that, in the hope of defeating the jurisdiction of this court, the defendants in error are willing to abandon here, the grounds on which they sought to defeat the title of the plaintiff in error in the State courts.

The grounds on which the contentions of either party were based in the State courts, as shown by the record, can not be shifted in this court for the purpose of either injecting into or eliminating from the case, a Federal question.

Iowa v. *Rood*, 187 U. S., 87, Loc. Cit., 92.

III.

Defendants in error argue on the merits.

After thus conceding to the plaintiff in error all that it contended for in the State court, for the manifest purpose of eliminating the Federal question and making the decision of the State court conclusive, defendants in error suddenly change front and enter upon a discussion of the case upon the merits under the heading:

WAS THE LAND AT THE TIME OF THE SURVEY PERMANENTLY SUBMERGED OR ONLY TEMPORARILY UNDER WATER? Page 4, First Brief.

This they say "is a question of fact" and continuing they say: "Furthermore, no matter how the question of fact is decided, still the State of Arkansas acquired the title. If submerged land at the time, the manner of acquisition has been shown; if not submerged it passed under the patent for the whole of fractional Township 12 North, Range 6 East."

That is to say, the defendants in error now contend that if the *locus in quo* was a lake it passed under the

rule of *Hardin* v. *Jordan* to the state as riparian owner "incidentally upon the issuance of these patents to the State of Arkansas,"—a proposition entirely fatal to the claims of the defendants in error. On the other hand they say, that if it was not a lake, but was unsurveyed land as distinguished from a body of water, as was contended by them in the State courts, then it passed to the state under the patent for the "whole fractional township" 12 North, Range 6 East,—a proposition wholly untenable as a matter of law.

(It will be noted that defendants in error here say nothing about Township 12 North, Range 7 East, which is equally involved in this case.)

The foregoing assertion of the defendants in error, on which they rely so greatly, viz; that the selection, approval and patent of a "fractional township" containing only 7236 78-100 acres of surveyed land can be construed to mean a full township over two-thirds of which remained unsurveyed, would in itself present a Federal question, even if there were no other in the case. It involves not only a construction of the selections, approvals and patents, but also of the Swamp Land Act itself and of the Act of Congress regulating surveys of public lands. The third section of the Swamp Land Act is as follows:

"In making out lists and plats of the lands aforesaid all *legal subdivisions*, the greater part whereof is wet and unfit for cultivation, shall be included in said lists and plats, but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom."

What is meant by a "legal subdivision?"

The Act of Congress prescribing rules of survey (Revised Statutes, Sec. 2395) provides that:

"The townships shall be *subdivided* into sections, containing as nearly as may be, six hundred and forty

acres each, by running through the same, each way, parallel lines at the end of every two miles; and making a corner on each of said lines, at the end of every mile."

All there can be of a legal township must consist of these legal subdivisions, and these subdivisions must have been ascertained and laid off by a survey, before any selection, approval or patent can be made under the Swamp Land Act, for each legal subdivision must, under that act, be considered separately, in order to ascertain whether the greater part of it is "wet and unfit for cultivation." How then, could land (assuming for the purpose of argument, this to have been land) which had never been surveyed and therefore not divided into legal subdivisions, be legally selected, approved or patented? And, especially, how could a full township pass by a patent which purported to convey only a fractional township?

It is plain that if, at the time of the survey of the fractional township, the region now in question was land, as distinguished from water, it never was surveyed, and therefore never has been selected, approved or patented as such land.

Gazzam v. *Phillips,* 20 How., 372;
Horne v. *Smith,* 159 U. S., 40.

If on the other hand it was not land but, as shown by the official records of survey and as officially found by the Secretary of the Interior, was a permanent body of water then, as aptly stated by defendants in error in the passage already quoted from their brief, under the rule laid down in *Hardin* v. *Jordan,* the title to the land under water passed "incidentally upon the issuance of these patents to the State of Arkansas," and it follows, as we contend, that under the same unquestioned rule of conveyancing, as recognized by the local law of

Arkansas, upon the issuance of patents without reservation by the State of Arkansas, for the abutting surveyed lands, the title to the land under water passed "incidentally upon the issuance of these patents" from the State of Arkansas to the plaintiff in error by *mesne* conveyances.

It is clear that the plaintiff in error can not be deprived of its title by the contention that the *locus in quo* went to the state as an unsurveyed part of a full township, under a patent which, by its terms conveyed only a surveyed fractional township, according to the plat of the government survey which is part of the patent itself, and shows definitely the surveyed acreage as well as the configuration of the unsurveyed water on which the surveyed fractional sections are therein meandered.

Although in what has been said above, particular reference has been made to fractional Township 12, Range 6, the same remarks are equally applicable to Township 12, Range 7, which is also fractional as shown by the official plats of survey which are to be read into the patent.

Jeffries v. *East Omaha Land Co.*, 134 U. S.. 178, 33 L. Ed., 872.

Hence the patent of the whole of Township 12, Range 7, could convey *as land* only the surveyed part within the external surveyed lines of the platted township; but by virtue of the riparian rights incident to the grant of the abutting land, without reservation, the patent did convey the bed of the lake beyond the external line of the surveyed fractional township. See pages 103 to 106 of former brief of plaintiff in error.

The doctrine of quantity giving way to metes and bounds has no application, where the metes and bounds of surveyed areas shown on the plats of survey make up the exact quantity stated in the conveyance of which

the plats of survey were a part. The familiar rule of construing an instrument so as to harmonize all parts thereof confirms our contention that only the surveyed areas passed as land by the patents in question, the bed of the lake passing by riparian right incident thereto.

IV.

The fundamental question in this case is how did the title to the locus in quo pass from the United States to the State of Arkansas? The answer to this query determines the respective claims of these litigants.

It is true that on pages 97 and 100 of the former brief of plaintiff in error, the expression is used "Plaintiff in error and defendants in error claim under a common source of title, the State of Arkansas."

This is true only in the sense that both parties are claiming from the United States through the State of Arkansas titles essentially differing from each other. It is not true, as contended by the defendants in error, that both parties are claiming under the state as a common source of title in the sense that they are claiming the same title through the state.

This contention, by which it is sought to deprive this court of jurisdiction, is specious and can not bear an analysis. It is true that both parties seek to trace their respective titles through the State of Arkansas, but the plaintiff in error contends (and as the record shows, has so contended from the beginning of this suit in the State courts), that the title which passed from the United States was of a riparian character, and by reason of this character which it then had, it necessarily under the local law of Arkansas (about which local law no question is raised in this case), passed with the surveyed

abutting fractional sections from the State by *mesne* conveyances to the plaintiff in error and carried the bed of the lake.

While, on the other hand, the defendants in error contended in the State courts (and based their claim on that contention), that the state derived from the United States a title to the land in controversy entirely different in character from the kind of title which rests on riparian rights, and that by reason of this difference, it did not pass from the state to those under whom the plaintiff acquired the surveyed abutting fractional sections. It is plain that the plaintiff in error and the defendants in error are claiming two different things and that the questions which create this difference, arise at the point where the United States parted with the title and before the State of Arkansas got it.

This is not one of those cases where there is no dispute about the manner in which the title passed from the United States to the state and where everything in connection with that grant is admitted; the only question in such cases being, as to whether the title has passed from the state to one party or the other. Here the whole controversy turns on the manner and extent of the grant from the United States to the state, and the question of whether the land was of a riparian character at the time of the grant from the United States to the state, enters vitally into this controversy and is therefore, for the reasons which we have fully stated in our former brief, a Federal question, depending for its determination upon the records of the official acts of the authorized agents of the United States in the Land Department, including the findings of the Secretary of the Interior.

In *Miller* v. *Dale*, 92 U. S., 473, Mr. Justice Field says:

"In an action of ejectment, where both parties assert title to the premises—the plaintiff under a concession

of the former government, confirmed by the tribunals of the United States and an approved survey under an act of Congress, and the defendant under a patent of the United States issued upon a similar confirmed concession —the inquiry of the court must extend to the character of the original concessions to ascertain which of the two titles gave the better right to the premises; and if these do not furnish the means for settling the controversy, reference must be had to the proceedings before the tribunals and officers of the United States, by which the claims of the parties were determined."

All cases cited by defendants in error in support of the proposition that a common source of title in the state through which the litigants claim title is fatal to federal jurisdiction, are cases where no dispute has arisen as to how the state acquired its title. All are cases where the rival claims of the state's grantees are unaffected by the method by which the state acquired, or the character in which, it held the title, prior to its disposal thereof.

V.

Did the State of Arkansas acquire title to the land in controversy by virtue of riparian rights?

We understand defendants in error to say, on page 2 of their first brief, that the state did so acquire this land and therefore that the rule of *Hardin* v. *Jordan* is applicable. This, of course, concedes the existence of a permanent body of water. But as before stated, they say this now for the first time, and apparently by thus admitting the grounds on which plaintiff in error bases its claim, seek to defeat the jurisdiction of this court to review the judgment of the State court favorable to the defendants in error.

Then again, they say (for the first time in this case,) that if this lake was a body of water at the time of the

survey, "it became the property of the state *by reason of its sovereignty* regardless of the patents." Page 9 of additional brief of defendants in error.

It is unnecessary to comment on the inconsistency of two such contentions. But viewing this claim of title by sovereignty apart from the many other inconsistent claims of the defendants in error, it is enough to say, that the defendants in error have, in their pleadings and in all of their contentions in the State courts, professed to deraign their title from the United States under the Swamp Land Act, and never, at any time, impliedly or otherwise, alleged or claimed that the state acquired this land otherwise than as *swamp land*, selected, approved and patented to it under that act. Therefore the proposition, now suggested for the first time, that the state could have acquired this land by virtue of its *sovereignty*, is entirely irrelevant to this case. There was no such question presented or passed upon in the State courts.

VI.

Defendants in error without color of title from the United States.

The defendants in error in the State courts based their claims on the contention that the *locus in quo* was not a permanent body of water at the date of the survey.

If the Secretary of the Interior had found such to be a fact, yet, on no theory under any of the cases cited by defendants in error, could they claim such fact as a basis of title. On the other hand, if it was such a body of water, the title of the land now in controversy necessarily accrued to the plaintiff in error as riparian owner, upon the principles of conveyancing recognized by the local law of Arkansas and about which there never has been any question in this case. Hence the defendants in

error never had any interest in any proceeding in the Land Department for the determination of the character of the region in question. They are in the position of mere intruders and not necessary parties to such proceeding. They have not even a color of title from the United States.

Ehrhardt v. *Hogaboom*, 115 U. S., 67.

VII.

Incompetency of parol evidence to impeach official surveys.

While the character of the region in question has been legally and finally established by the official surveys made under the direction of the Land Department and the findings of the Secretary of the Interior, yet, as showing how wholly incompetent was the sort of parol evidence offered by the defendants for the purpose of impeaching those surveys we quote below the language of Mr. Justice Miller speaking for this court in *United States* v. *Maxwell Land Grant Co.*, 121 U. S., 325, where the correctness of certain official surveys had been questioned. He said:

"We take the general doctrine to be that when, in a court of equity, it is proposed to set aside, to annul or to correct a written instrument, for fraud or mistake in the execution of the instrument itself, the testimony on which it is done must be clear, unequivocal and convincing, and that it can not be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents and other solemn evidences of title emanating from the government of the United States under its official seal. * * * It is not to be admitted that titles by which so much

property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the government, and, as in this case, under the seal and signature of the President of the United States himself, should be dependent upon the hazard of successful resistance to the whim and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such attempt successful."

VIII.

Authorities incorrectly applied.

Defendants in error, on page 4 of their first brief say: "Where the boundaries of the patent do not in terms cover the adjacent submerged lands, they nevertheless belong to the state as incidental to its sovereignty," citing *Iowa* v. *Rood*, 187 U. S., 87. This case, upon examination, will be found to contain no such holding, for that court did not entertain or pass upon that question. Again, on page 7, of their first brief, they cite this same case as authority for the statement that "a decision of a state court adverse to a claim of title to a lake bed, presents no Federal question, which will sustain a writ of error from the Supreme Court of the United States."

In the case above mentioned (*Iowa* v. *Rood*,) the State of Iowa claimed in the State court the ownership of the bed of a lake by reason of *its sovereignty*, as against a claimant under the Swamp Land Grant. The Supreme Court of Iowa decided the case in favor of the swamp land claimant. The state sued out a writ of error from this court. This court held that there was no Federal question, because the ownership by states of the beds of waters by virtue of sovereignty was not based on any statute, or on the constitution of the United

States, but on the common law which antedated both. The court held, therefore, that no law of, or authority exercised under the United States was involved in the claim of the state; but the court concluded by saying: *"Had the decision of the Supreme Court been adverse to the plaintiffs, who claimed title under the Swamp Land Act, it is possible that a writ of error might have lain* from this court, but we have frequently held that to sustain such writ, the decision must be adverse to a right claimed under an act of Congress, or *to the exercise of an authority granted by the United States."*

In *Iowa* v. *Rood, supra,* there was no question as to the correctness of the official survey in showing the existence of the lake there involved. It was not disputed that the lake did exist as shown by that survey and there was no attempt to impeach the returns of the government surveyors or to construe or misconstrue those returns. Their survey showed the fact of the existence of the lake and their official acts in doing this (being clearly within their powers) were not drawn in question as in the case at bar. Hence this case can not be applied to the case at bar in the manner attempted by defendants in error on page 16 of their additional brief.

Defendants in error say: *"A contention about boundaries however, raises no Federal question."* Additional brief of defendants in error, page 8.

This, however, is a suit which involves the manner and extent of a grant from the United States. It is not a suit, (as in the cases cited in brief of defendants in error) in which two persons are claiming to own on one side or the other of a given boundary which must be ascertained and located on the surface of the ground by certain monuments and calls in the survey, and about the true location of which there is a dispute.

In the sense in which the defendants in error imply that this is a suit "about boundaries" every suit involving the title to land might be called a suit about boundaries. Here, there is no effort required to find any line run by the survey. Every line so run is known and ascertained and its precise location on the surface of the ground is in no way disputed. But on one side of certain of those lines the surveys show the existence of a permanent body of water, and the question of the manner in which the *locus in quo* beyond these lines passed under the patents from the United States is not a question of boundaries, but, as above stated, purely one affecting the manner and extent of the grant from the United States. All of which is respectfully submitted.

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